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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 189

ROBERT W. MORRIS,

Appellant,

vs.

FORD MOTOR COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

CLAYTON C. PURDY,
FREDERIC S. GLOVER, JR.,
Counsel for Appellee.

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IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

No. 43,750

ROBERT MORRIS,
Plaintiff and Appellant,

vs.

FORD MOTOR COMPANY,
Defendant and Appellee.

STATEMENT OPPOSING JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES AND MOTION TO DISMISS.

This statement and motion is filed pursuant to Rule 12, Paragraph 3 of the Rules of the Supreme Court of the United States to disclose matters and grounds making against the jurisdiction of the Supreme Court of the United States asserted by appellant in his Statement of Jurisdiction, and to move the Supreme Court of the United States to dismiss this appeal for lack of jurisdiction.

I

The Jurisdictional Statement Fails to Disclose Any Federal Question Properly Presented or Even Considered Below

The supposed Federal question was raised for the first time in the Supreme Court of Michigan in appellant's Reply Brief. It was not raised in the Circuit Court, and was not

mentioned in appellant's Reasons and Grounds for Appeal from the Circuit Court to the Supreme Court of Michigan. The Federal question was, therefore, not decided, discussed, or even mentioned in the Opinion of the Supreme Court of Michigan (320 Mich. 372). The settled practice of the Supreme Court of Michigan is to refuse to consider on appeal questions not raised in the trial court and not stated in the Reasons and Grounds for Appeal. *Hazel Park Nonpartisan Taxpayers Association* v. *Township of Royal Oak*, 317 Mich. 607, (1947); Appeal dismissed 92 U. S. (L. Ed.) 168, 68 Sup. Ct. 219 (1947). The Michigan Supreme Court there said (317 Mich. 620):

> "But appellant (Ferndale) did not raise this question at the trial and it was not presented as a ground of appeal; therefore we will not pass upon it here."

It is, therefore, clear that appellant, under Michigan practice, did not properly present the question of constitutionality for decision by the Supreme Court of Michigan, and it was not considered or decided by that court.

II

The Decision of the Supreme Court of Michigan Has Non-Federal Grounds Adequate to Support It

There are three non-Federal grounds adequate to support the decision of the Supreme Court of Michigan:

(1) Appellant was not entitled to have the Federal questions passed upon by the Supreme Court of Michigan because he did not raise them in the trial court or state them in his Reasons and Grounds for Appeal. This has already been discussed under point I.

(2) There has been no final determination by the Michigan Supreme Court that appellant's alleged injury

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is not covered by the Michigan Workmen's Compensation Act, because he did not appeal from the order of the Compensation Commission denying recovery under the Act. Under Michigan law, this failure to appeal bars recovery at law thereafter:

Sotonyi v. *Detroit City Gas Co.*, 251 Mich. 393;
Dailey v. *River Raising Paper Co.*, 269 Mich. 445;
Twork v. *Munising Paper Co.*, 275 Mich. 174;
Curley v. *Beryllium Corp.*, 278 Mich. 23;
Cell v. *Yale & Towne Manfg. Co.*, 281 Mich. 567.

In *Twork* v. *Munising Paper Co.*, supra, the Supreme Court of Michigan said, at page 181:

> "Plaintiff's claim was not erroneously filed, though it may have been erroneously determined, but this he did not question by appeal. He may not now litigate his claim elsewhere. The unappealed determination of the department through its deputy commissioner is *res judicata.*"

The effect of failure to appeal from the order of the Compensation Commission is obviously purely a matter of Michigan law, and its disposition adverse to appellant is adequate to support the decision now appealed from.

(3) Appellant proceeded before the Compensation Commission on the theory that his injury arose out of and in the course of his employment, but in the present action he has proceeded on the theory that his injury did not so arise. The Supreme Court of Michigan held that, having adopted one theory before the Compensation Commission, he may not thereafter bring other proceedings based upon an inconsistent, opposite theory or claim (320 Mich. 372, at 375). This is purely a question of State law, and is of itself conclusive of the case.

III

There Is No Substantial Federal Question Involved

There might possibly have been a substantial Federal question here if appellant had appealed to the Supreme Court of Michigan from the adverse decision of the Compensation Commission and if the Michigan Supreme Court had affirmed the decision of the Compensation Commission, but in the absence of such an appeal, there has been no determination by the highest court of the State of Michigan that appellant is not entitled to compensation under the Michigan Workmen's Compensation Act. The Compensation Commission may well have been wrong in its determination. The Supreme Court of the United States should not assume to the contrary in order to create and consider a possible Federal question not passed upon by the Michigan Supreme Court.

Wherefore, Ford Motor Company, defendant and appellee, by its counsel, respectfully submits that the Supreme Court of the United States has no jurisdiction of this appeal.

For the reasons stated in the foregoing statement, appellee, by its counsel, moves the Supreme Court of the United States to dismiss the appeal for lack of jurisdiction.

Dated: July 13, 1948.

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